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Supreme Court, U.S.
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No. 95-212

In The

Supreme Court of the United States

October Term, 1995

DONNA FRED,

Petitioner,

vs.

THE WACKENHUT CORPORATION
and OMAHA PUBLIC POWER DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT, THE WACKENHUT CORPORATION'S, RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a petition for writ of certiorari point out any perceived misstatements in the petition. Respondent, The Wackenhut Corporation (TWC), believes that one of many misstatements contained in the petition appears in the second "Question Presented" in the petition.

Although Petitioner asserts that her conduct and mental state, which was the basis for TWC's decision to suspend and terminate her, would not have occurred but for the allegations of sexual harassment brought by Petitioner, the trial court and the Eighth Circuit Court of Appeals simply found that Petitioner's conduct and mental state had no relation to any alleged sexual harassment or charges of sexual harassment presented by Petitioner. The courts below specifically found that, as required by law, TWC, upon learning of the one and only incident of sexual harassment directed against Petitioner, took prompt, remedial, and appropriate corrective action. *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 370 (1993); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405-06 (1986). Moreover, this issue did not involve a question of law that was decided by the courts below, but rather a fact finding by the lower courts.

In her third "Question Presented," Petitioner alleges that the courts below made incorrect factual determinations by deciding that TWC took prompt, remedial, and appropriate corrective action. However, the courts below

QUESTIONS PRESENTED – Continued

did not find, as asserted by Petitioner, that Respondents responded as asserted in Petitioner's "Questions Presented" number 3. The courts below found that Respondents issued a memo promptly after learning of the alleged sexual harassment incident to all employees, warning them not to make slanderous or harassing comments. Further, TWC made a prompt investigation after complaints made by Petitioner. Such investigation was adequate and was conducted by employees of TWC who lived and worked outside of the state of Nebraska, where the alleged discriminatory acts took place. Moreover, TWC held a meeting on March 25, 1989, with Petitioner present, in which all employees were warned not to harass any other persons. TWC issued a memo that same day stating that employees were not to harass other persons. Petitioner was present at the March 25, 1989 meeting and was able to say what was on her mind. Significantly, Petitioner *admits* that no alleged harassment occurred after March 25, 1989.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 3

II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT DECIDE A QUESTION OF FEDERAL LAW 5

III. NO ARGUMENT IN SUPPORT 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963) 4

Harris v. Forklift Systems, Inc., ___ U.S. ___, 114 S.Ct. 367 (1993) i

Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) i

RULES

Supreme Court Rule 10 ..... 3, 4, 8

Supreme Court Rule 15 i

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STATEMENT OF THE CASE

Another misstatement is found in Petitioner's "Statement of the Case" section of the Petition. On page 5 of her Petition for Writ of Certiorari, Petitioner states that no action was taken by Respondents to the one instance of sexual harassment that was proved and found to be true by the courts below. This statement is false. The courts below specifically found that: a prompt investigation was conducted into the allegation of sexual harassment; two memoranda were issued warning all employees not to

harass any other employees; a meeting was held among all employees who worked with or around Petitioner, and in which Petitioner attended and was allowed to assert her allegations of sexual harassment; and in the meeting, all employees were warned not to harass anyone.

All of the alleged facts contained in Petitioner's "Statement of the Case" section of her Petition are no more than bald assertions of sexual harassment, which the trial court found to be false. Other than one incident, the allegations asserted by Petitioner that were found to be true by the courts below were deemed not to constitute sexual harassment. The courts below determined that after the one incident, Respondents took prompt, remedial, and appropriate corrective action after learning of the harassing incident.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit Court of Appeals is proper. The decisions of the Eighth Circuit and the trial court were factually based. Although Petitioner asserts that the courts below decided questions of law incorrectly, the whole basis of her Petition for Writ of Certiorari is that the trial court and the appellate court incorrectly decided purely factual issues.

Throughout her petition, Petitioner asserts that the trial court made incorrect factual findings and incorrect credibility determinations.

Therefore, it is clear that the decisions of the trial court and the court of appeals were factually based so

that none of the reasons for a grant of certiorari as stated in Supreme Court Rule 10 are present in this case.

ARGUMENT

I. THERE HAS BEEN NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Without citing any case law, constitutional law, or statutory authority, Petitioner asserts that the Eighth Circuit Court of Appeals departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner has failed to show how the Eighth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings. Petitioner does no more than assert that the Eighth Circuit Court of Appeals, by affirming the trial court, should have decided factual issues in her favor.

Petitioner points to no errors of law that were made. Petitioner asserts that there were errors of fact *and law* made by the trial court and the Court of Appeals, but fails to point out any alleged errors of law committed by either of the courts below.

Petitioner does no more than request the Court to review factual determinations made by the trial court and the Court of Appeals so that the allegedly mistaken factual determinations can be corrected. For example, under her first reason for granting certiorari, Petitioner states that "the trial court was in *error as a matter of fact* in

finding Petitioner had failed to prove that there was lewd language being used over the intercoms."

The following quotes from the Petition illustrate the purely factual basis for Petitioner's Petition. Petitioner asserts that "another example of sexual harassment which was indisputably *supported by the evidence other than Petitioner's testimony alone*, but which the trial court refused to consider was the graffiti in the men's bathrooms." In the next paragraph, Petitioner asserts that "another example of sexual harassment which was *supported by the testimony* was *the fact* that Petitioner's name was forged on the pass-on log and her face card badge was defaced with a drawing of a mustache on it." In the next paragraph, Petitioner asserts that "there is no dispute that Petitioner was the one instructed to go around to her co-workers and find out what it was they did not like about her." She asserts that this instruction was retaliatory counseling and disciplinary action. The trial court, *in a finding of fact*, found that such instruction by the Respondent to the Petitioner was not retaliatory nor disciplinary. In the next paragraph, Petitioner asserts that "in all, there were many acts of sexual harassment which were either *supported by credible testimony* other than Petitioner's or were totally undisputed by the Respondents."

This Court is not a fact-correcting court. *See Fay v. Noia*, 372 U.S. 391, 436, 83 S.Ct. 822, 847 (1963). It does not sit to correct alleged factual mistakes made by lower courts. There are no special and important reasons, whether under Rule 10 or not, for the Court to grant Petitioner's Petition for Writ of Certiorari. There is no evidence, supporting case law, constitutional law, or statutory law supporting Petitioner's allegations that the

Eighth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings.

II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT DECIDE A QUESTION OF FEDERAL LAW

Petitioner asserts that the Court of Appeals' affirmance of the trial court's opinion that there was no evidence that Petitioner's suspension or termination was due to anything other than her violations of company rules and procedures was a determination of a question of federal law by the Eighth Circuit Court of Appeals.

Petitioner fails to assert any question of federal law which was decided by the Eighth Circuit Court of Appeals. Petitioner asserts in her Petition for Writ of Certiorari that the trial court made a "no evidence" determination. In other words, Petitioner asserts that there was a factual determination by the lower courts that there was no evidence that Petitioner's suspension or termination was due to anything other than her violations of company rules and procedures. Petitioner points to no statutory law or case law that was changed or given a new interpretation by the courts below. There was no new creation of federal law by the Eighth Circuit Court of Appeals. Petitioner does no more than assert that the trial court and the Eighth Circuit Court of Appeals made incorrect factual determinations.

Petitioner further asserts that the alleged question of law decided by the Court of Appeals and which should be determined by this Court is: whether an employer should be allowed to use the reasonable conduct of an

employee, which is caused by a sexual harassment experience by that employee, in order to justify its actions against an employee for such conduct. Petitioner misstates what the Court of Appeals and the trial court found. The lower courts determined that Petitioner's conduct was not reasonable. They found that Petitioner's conduct was not caused by any sexual harassment. They found that there was no sexual harassment. They found that Respondents took no retaliatory or disciplinary actions against Petitioner. They found that there were no acts, other than one, that constituted sexual harassment. The courts below found that upon learning of the one incident of sexual harassment, Respondents took prompt, remedial, and appropriate corrective action.

Petitioner assumes facts that were not proven at trial and that the trial court specifically found were not credible. These assumed facts were found to be false and incredible by the courts below. Therefore, Petitioner does no more than assert that the courts below made incorrect factual determinations. She then asserts that if the courts below had made "correct" factual determinations, then a question of law was decided based upon these *assumed* facts.

Petitioner next argues that the trial court made an incorrect factual determination in deciding that Respondents took prompt, remedial, and appropriate corrective action after learning of the one incident of sexual harassment. She further argues that there were other acts of sexual harassment. The courts below found that such incidents did not occur. Petitioner then states that the courts below are incorrect because there were witnesses

other than Petitioner that testified to these sexual harassment acts. However, this is simply asserting that the trial court and the Court of Appeals made incorrect credibility determinations. There is no showing that the courts below made determinations of law.

Petitioner concludes her argument under her second reason for granting certiorari by asserting that TWC should not be allowed to use Petitioner's mental state at the time of her psychological examinations against her unless it can prove such mental state was caused by a factor other than the sexual harassment and TWC's failure to remedy it. This assertion points out Petitioner's real argument: because she was allegedly sexually harassed, her mental state was unstable, which in turn caused her to lose her job. However, the trial court specifically found that Petitioner was not sexually harassed and, but for one incident, any of Petitioner's allegations that were credible did not constitute sexual harassment. Therefore, Petitioner's argument must fail because at least one of the facts she assumes was found not to be true by the trial court.

Petitioner states no special and important reasons for granting her Petition. Accordingly, the Court should deny Petitioner's Petition for Writ or Certiorari.

III. NO ARGUMENT IN SUPPORT

Although Petitioner presents three questions to the Court, she presents argument under only the first two. Petitioner does not present any argument under her third question presented. Therefore, Petitioner has waived any

arguments or claims for relief under her third question presented.

Even if Petitioner's third question presented is considered by the Court, the third question presented is nothing more than an allegation that the trial court made an incorrect factual determination. The trial court found that Respondents took prompt, remedial, and appropriate corrective action in response to Petitioner's complaints of sexual harassment. Petitioner claims that such actions on the part of the Respondents were not prompt, remedial, and appropriate corrective action. These are purely factual arguments that fail to meet the requirements of Supreme Court Rule 10.

The Court should deny Petitioner's Petition for Writ of Certiorari because she attempts to enlist the Court in correcting the allegedly mistaken factual determinations made by the courts below. Petitioner shows no special and important reasons for granting the Petition as required by Supreme Court Rule 10.

CONCLUSION

None of the considerations for the grant of certiorari set forth in Supreme Court Rule 10 are present in this case. The courts below have resolved factual matters on overwhelming evidence. There is no conflict of circuit court decisions. The federal statutory law in this area is clear and was not disturbed by either the trial court or the Eighth Circuit Court of Appeals. Neither court below made any new question of law determinations that have not been settled or ruled upon by the Court. Petitioner

has therefore failed to sustain her Rule 10 burden of establishing special and important reasons justifying the grant of writ of certiorari.

Accordingly, the Petition should be denied.

Respectfully submitted,

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